HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 80 OF 2001.

Chandrasen Maruti Dhotre,]
Age: 37 years, Occu: Mason,]
R/o: Dotre Hutment,]
Old Kupwad Road, Sangli.]
(At present detained at]
Sangli Prison.)]
..Appellant.

Versus.

The State of Maharashtra. ..Respondent.

Mr. M.S.Mohite for the appellant.

Mr. F.R.Shaikh, APP for the respondent.

CORAM: S.B.MHASE &
S.R.SATHE JJ

DATE: JUNE 8, 2005.

ORAL JUDGMENT (Per S.B.MHASE,J.)

1. The appellant - accused herein is convicted by the Sessions Judge, Sangli in Sessions Case No. 111 of 1999 decided on 17th January 2001 for the offence under Section 302 of the Indian Penal Code, 1908 (hereinafter, in short referred to as "the IPC".) and is sentenced to suffer imprisonment for life and pay fine of Rs.3,000/- and in default to suffer R.I. for 1 month. The same judgment and order is under challenge in the present appeal.

2. The incident has taken place in ‘Dhotre Aba’

Zopadpatti, situated at Old Kupwad, District: Sangli. The deceased -Sitaram is the brother in law of the accused, i.e., sister of the deceased is the wife of the accused. They were residing in the hutment referred to above. Their houses are having thatched walls. In between the house of the accused and house of the deceased there was a common thatched wall. The accused was in the habit of playing tape-recorder in a loud volume which annoyed the deceased and his family members. On 9.8.1998 at about 9.00 p.m. while the deceased and his family members were sleeping the accused played the tape-recorder in his house and the utensils in his house collapsed. Therefore, the accused become aggressive and abused the deceased and his family members. Therefore, the deceased came out of the house and came in front of the house of the accused. There was a verbal exchange of words between the accused and deceased. While the verbal exchange was going on, the accused took out the knife and assaulted the deceased on back and stomach and ran away from the house. Thereafter the deceased was taken to the Civil Hospital, Sangli. However, he succumbed to the death at 4.00 a.m. on 10.8.1998, i.e., the deceased has died within 7 hours from the assault. In the morning FIR was lodged by the wife of the deceased - Shantabai (Pw-3). The post mortem was carried out and thereafter the investigation was carried out and the accused was chargesheeted.

3. In the present case, the death of Sitaram has been caused because of five injuries, which were inflicted on his person. Those injuries were deposed to by the Doctor Mr.Sargar (PW-5) who has initially examined the deceased on admission. From the post mortem report, which is at Exhibit-34 [which is proved by Witness Dr.Mane (Pw-6)], those four injuries were accepted, apart from the injuries which were caused as a result of medical treatment. Internal injuries were also noted by Pw.6 and those are as under:

1) Incised wound 1.5 x05 cms at 5th intercostal space posterior aspect - corresponding to external injury No.3 in Col.17.

2) Fracture 6th rib- anterior aspect with sharp margins with continuing thoracotomy sutured wound posteriorly - 6th intercostal space corresponding to external injury No.2 in Col.17.

3) Two incised wounds 2 cms apart over 9th intercostal space, 1.5 x 05 cms. and fracture lower 9th and upper 10th costal margin cut with sharp margins corresponding to external injury No.4 of column No.17.

4) Incised wound 1.5 x 0.5 cms over left 11th intercostal space mid-axillary line corresponding to external injury No.5 in column No.17.

5) Pleura reputured corresponding to upper injuries.

6) There was sutured wound over left lung upper and lower lobe corresponding to external injury No.3 in column No.17.

7) Left haemothorax 200 cc present.

8) Sutured wound over peritoneum corresponding to external injury No.1 in column No.17.

9) Peritoneum reputured corresponding to external injury No. 6 & 9 in column No.17.

10) Haemoperitoneum 800 cc present.

11) Left retroperitoneal heamatoma 400 cc present.

12) There were four sutured wounds 1.5 cms long each over small intestine.

13) There were two sutured wounds 1.5 cms each over large intestine.

14) Spleenic tear with uniform margins 1.5 X 0.5 x 1 cms with haematoma.

15) Left kidney tear with uniform margins 1.5 x 0.5 x 1 cms with haematoma.

. The cause of death given by Doctor (Pw-6) Mr. Bhave is "shock due to injury to vital organs." These injuries have been caused by knife. The knife (Article-"A") was shown to the Doctor, who has stated that those injuries are possible by the said article. Thus, the prosecution has proved that the death of deceased Sitaram was homicidal one.

4. So far as the incidence is concerned, there is no dispute between the parties. In order to prove the incidence, the prosecution has examined PW.3 & 4 as eye-witnesses. PW.3 (Shantabai) is the wife of the deceased and PW.4 (Ashok) is the brother of the deceased.

Apart from that the prosecution has examined PW.2 (Sanjay) as a panch to prove the discovery of the knife at the instance of the accused. Exhibit-25 and Exhibit-25(A) respectively are the Memorandum statements of the accused and discovery panchnama in respect of Article-7. The Chemical Analyser Report at Exhibit-46 shows that the knife is having human blood, however, the blood group is inconclusive.

5. Both PW.3 & 4 have narrated the incident as reflected from Exhibit-28 (FIR) and they have corroborated each other in material particulars. Thus, the prosecution has established the guilt of the accused. We are not going into the details in respect of the proof of these facts, because even according to the defence the incidence is admitted. We find on record Complaint (Exhibit-11) lodged by the accused - Chandrasen, wherein he has stated about the relationship between the deceased and himself (accused) and thereafter he has narrated the incidence dated 9.8.1998. Only thing he has improved is that -the knife was brought by the deceased and the deceased had assaulted on his left hand and that the other relative, namely, PW.4 (Ashok) and others separated the accused and deceased and thereafter the accused went to railway station and slept there. However, the police had brought the accused from the Railway Station. The accused has also produced Injury

Certificate (Exhibit-12), from which it appears that there was a stab wound of 1 x 1/2 x 1 cms. on dorsum of (lt) hand in between 2nd and 3rd metacarpal bones, edges sharp and dull white with blish discolouration around wound, no fresh bleeding. He is also having three other abrasions, i.e., abrasion 3 x 1/2 x 3 cms below (Lt) elbow dorsals, abrasion 6 cm x 1/2 cm on (lt) shoulder, abrasion 2 x 2cm on back of neck.

6. Since the incidence of scuffle is admitted between the parties, the learned counsel for the appellant has submitted that it is not disputed that the death is homicidal one but it is submitted by the learned counsel for the appellant that the death cannot be classified as murder, as has been done by the Sessions Judge in the present case. The learned counsel submitted that this is a case which falls under Exception-4 to section 300 of the Indian Penal Code and, therefore, liable to be considered for punishment under section 304(II) of the IPC. In view of these submissions we think it appropriate to consider the case of the appellant for the benefit under section 304(II) by making a scrutiny as to whether the case falls in Exception-4 to Section 300.

7. Exception 4 to Section 300 is as follows:

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

8. Before we consider the facts of the present case, it will be appropriate to make a reference to the Apex Court judgment reported in **2003 SAR (Criminal) 384** (Manke Ram v/s. State of Haryana) where the facts were that; "on 17th November 1993 at the residential part of the appellant's quarters in Sangatpura where the appellant was In-charge of the Police Post. At about 9.30 p.m. on that day, the appellant came back from his duty at that time it is stated that Suraj Mal the deceased who was a Head Constable in the Sangatpura Police Outpost was standing near the quarters of appellant in the company of his nephew PW-5. On seeing them the appellant invited the deceased for a drink in his room leaving PW-5 outside. It is an admitted case that while appellant and Suraj Mal were drinking in his room at about 9.45 pm., PW-5 Raj Pal went into the room and asked Suraj Mal to get up so that they could have their dinner. Suraj Mal acceded to this request, because of which the appellant got annoyed and abused the deceased in filthy language to which the deceased objected, which further annoyed the appellant and he picking his service revolver fired two shots at Suraj Mal, hitting him on the right side of the neck and left

side of his thigh. The prosecution case further proceeds by stating that the two of them grappled with each other and came outside the room."

. While considering these facts, the Apex Court has observed that; "whether this action of the appellant which caused the death of Suraj Mal would amount to murder or culpable homicide not amounting to murder. It is an admitted fact that there was no enmity between the appellant and the deceased and a few days before the incident in question the appellant was promoted to the rank of Assistant Sub-Inspector of Police and he was put In-charge of Sangatpura Police Station wherein the deceased was also posted as Head Constable. It is also the case of the prosecution itself that on the fatal day when the appellant came back from the duty to his quarter he invited the deceased to his room to have a drink which was accepted by the deceased and both of them were drinking in the room of the appellant. It is at that point of time PW-5 who happened to be the nephew of the deceased came into the room and interrupted their drinking session by tasking his uncle to get up and join him for dinner which was obviously not liked by the appellant who being offended by the said interruption started abusing in a language which was not to the liking of the deceased who protested against such abuses. It is also the prosecution case that it is sequel

to this interruption of PW.5, a physical fight started between the appellant and the deceased in which, of course, the appellant used his service revolver causing fatal injuries."

. The Court observed that;

> "....we will have to examine the prosecution evidence whether the appellant had taken an undue advantage or acted in a cruel or unusual manner so as to deprive him of the benefit of Exception 4 to Section 300. As noted above, there is no motive for killing the deceased. The drinking session in the room of the appellant was by mutual consent and admittedly the fight started because of the intervention of PW-5. From these circumstances, it can be very clearly held that the incident in question took place in a sudden fight in the heat of passion. The next question, therefore, for our consideration, is whether the appellant did take an undue advantage of the said fight or acted in a cruel or unusual manner. Keeping the fact that both the appellant and the deceased had consumed considerable amount of alcohol which is established from the evidence of the doctor and the service revolver being next to the place where the fight took place and was not kept there by a planned act by the appellant, it cannot be altogether ruled out that the shots were fired with an intention of taking any undue advantage by the appellant. It is probable that in an inebriated condition the appellant used the service revolver because of the physical fight between the two."

9. Another judgment which has been relied upon by the learned counsel for the appellant is **2004 SAR (Criminal) 707** in the case of **Sridhar Bhuyan v/s. State of**

Orissa. The facts involved in this case are that; "on 21.8.1988, Umakanta (brother of the appellant) teased Jayanti, the niece of Chintamani Rout (PW-1), father of the Prataph (hereinafter referred to as the deceased). On 22.8.1988 Pratap complained about the previous incident to his father (PW-1) who asked him to wait till the arrival of Jayanti's father who was away from village. In the evening when Jayanti's father returned home, the deceased along with Jayanti's father and Benudhar Rout (PW-5) went to the house of the appellant to ascertain the reason for his having teased Janyanti. As Umakant was absent nothing could be decided. On the succeeding day, i.e., 23.8.1988, morning, the deceased went to the house of the appellant to ascertain whether his brother Umakanta had returned home. He also insisted that the appellant and his brother Umakanta should come for a settlement of the incident regarding teasing of Jayanti. As they refused quarrel ensued there. At this moment, the appellant went inside his house and came out with a knife and dealt blows with it on the back of the deceased. When the deceased turned his face, the appellant caught hold of his neck and pierced the knife into his chest. PWs. - 4 & 7 who were present at the spot tried to save the deceased from the appellant but could not succeed. The deceased who had fallen down near the fence of Chakradhar Bhuyan was, however, taken to the village library where he succumbed to his injuries."

. Considering these facts, in paragraph no.9, the Apex Court has observed that;

> "the Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception-1 there is total deprivation of self-control, in case of Exception-4, there is only that heat of passion which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with case in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it was so, the Exception more appropriately applicable would be Exception -1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had aggravated it by his own conduct it would not have taken the serious turn if did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception-4 can be invoked if death is caused
>
> (a) without premeditation,
> (b) in a sudden fight;
> (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner, and

(d) the fight must have been with the person killed.

To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception - 4 to Section 300, IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in the case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception - 4, it is not sufficient to show that there was sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

Consequently, Section 304(I) was applied to the accused.

10. Third case which was relied upon by the learned counsel for the appellant is **2004 SAR (Criminal)905 (in the case of Sachehey Lal Tiwari v/s. State of Uttar Pradesh.)** The facts giving rise to the prosecution of the accused are that; the Complainant Achhaiber Misra (PW-1) and both the accused are residents of village Ledupur within the circle of police station Sarnath district Varanasi in Uttar Pradesh. The agricultural fields of the two sides also adjoin each other near the old brick kiln towards each and south of the village. The ground level of the field of

complainant Achhaiber Misra is slightly higher than the level of the plots of the appellants. On 3.11.1995 at about 6.45 a. m. the accused persons SAchehey Lal Tiwari and Bachehey Lal Tiwari sons of Mahajan Tiwari and Pintoo grandson of Mahajan Tiwari were dismantling the demarcating line (mend) between the fields of the Complainant Achhaiber Misra and the accused. the Complainant Achhaiber Misra and witnessed it and he along with his sons Vijai Shanker Misra and Surender Nath Misra (hereinafter referred to as "deceased" by their respective names) reached near the field and asked the accused not to dismantle the demarcating line of the field. There was exchange of hot words between the two sides. Pintoo grandson of Mahajan Tiwari took out a pistol and handed it over to the accused Sachehey Lal Tiwari and then Pintoo and Bachehey Lal Tiwari exhorted by saying that the Complainant side should be killed. On it Sachehey Lal Tiwari, accused fired with that pistol at deceased Vija Misra and deceased Surender, as a result of which both sustained fire arm injuries and died instantaneously on the spot. The occurrence was witnessed by Prem Nath Misra, Rama Kant Misra (PW-2) and other village persons and thereafter the two accused and Pintoo ran away from the scene of occurrence, leaving behind the dead bodies.

. Considering the case under Exception-4 to

Section 300, IPC, the Apex Court observed that

> "The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilty upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception -1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had aggravated it by his own conduct it would not have taken the serious turn if did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception-4 can be invoked if death is caused;
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. Applying the test laid down by the Apex Court in the above referred judgments, it will be revealed in the present matter that the deceased was a close relative of the accused. The sister of the deceased is the wife of the accused. They are coming from Wadar community, i.e. lower strata of the society. They were residing in the huts which were constructed of the thatched walls. The incidence has taken place because of the trifle cause, i.e., playing the tape-recorder with a loud voice by the accused, which was not approved by the deceased and his family members,

because of falling of the household articles and utensils, altercations started between the accused and deceased. The deceased and his family members came questioning the behaviour of the accused in front of the house. There was exchange of abuses between both sides. The accused annoyed with the situation, came with the knife from his house and inflicted the 5 injuries. In this process, he himself has also received injuries which according to the accused is caused by the deceased. The scuffle in between the parties is admitted one. Even from the complaints lodged by PW-3 Shantabai and the accused are taken into consideration, it reveals that there was scuffle between both sides, which fact was supported by PW.4- Ashok. This all conduct shows that there was no premeditation by the accused so as to cause the death of the deceased - Sitaram. The altercations have started suddenly and in that sudden fight, the accused has lost passion and has inflicted the injuries. Though, the accused has selected the vital part of the body, however, at that point of time both sides were aggressive against each other and under these circumstances the death has occurred. From the facts, it appears that no undue advantage has been taken by the accused. On the contrary, after the incidence, he immediately left place and slept at the railway station. When the police came to question him, he lodged the complaint as against the deceased and the prosecution witnesses. Taking all these

facts in totality and the ratio laid down by the Apex Court in the above referred cases, we find that the present case falls under Section 304(I). We do not agree with the learned counsel that the conviction shall be under Section 304(II). Therefore, we pass the following order.

:O R D E R:

1. The appeal is partly allowed.

2. The conviction of the appellant under section 302 of the I.P.C. is set aside, instead the accused is convicted for the offence punishable under section 304(I) of the I.P.C. and instead of life imprisonment, the sentence is substituted by sentence for 10 years. The fine and punishment in lieu of fine imposed by the trial Court is hereby confirmed.

(S.R.SATHE,J.) **(S.B.MHASE, J.)**

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